A

Sime Hok Sdn Bhd v Soh Poh Sheng

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–2455 OF 2009

KN SEGARA, ABDUL WAHAB PATAIL AND AZAHAR MOHAMED JJCA

6 JUNE 2012

C

Contract — Breach — Limitation — Agreement silent on time frame for respondent to fulfil obligations thereunder — Whether what was reasonable time for performance became matter for court's determination — Whether one party to agreement could unilaterally impose time for completion on other party by notice or

D *demand — Whether parties' failure to appeal against reasonable time determined by court meant ruling that action was time barred was valid*

The High Court had, on the ground of limitation, dismissed the appellant's claim against the respondent founded on an oral agreement made in late 1992.

E The agreement did not provide for a time frame for the respondent to carry out his obligations thereunder nor did it state that time was of the essence. The trial judge determined that a one-year period was a reasonable length of time for the respondent to have performed his obligations under the agreement and ruled that the cause of action accrued on 31 December 1994. As the appellant's claim

F was filed in September 2002, the court held the claim was time barred. In its appeal against that decision to the Court of Appeal, the appellant submitted that as it had given the respondent notice on 15 May 1997 and again on 28 May 2002 demanding performance under the agreement, the claim was not time barred.

G

Held, dismissing the appeal with costs and affirming the decision of the High Court:

(1) The appellant's case was confined to the determination, as provided in

H s 47 of the Contracts Act 1950, of what was a reasonable time for performance. Unless agreed between the parties, what was a reasonable time became a matter for determination by the court on the evidence before it. The trial judge determined what that reasonable time was and, therefore, when time began to run. There was no appeal on the judge's

I finding as to what was the reasonable time. Instead, the appeal was as to when time began to run and the fact the appellant had given notices in 1997 and 2002 before filing its claim in September 2002 (see para 10).

(2) As the trial judge's determination of a reasonable time for performance under the agreement was not the subject of the appeal, it was accepted by

the parties. In the circumstances, the judge's finding that the Limitation Act applied was not erroneous (see para 3).

(3) As the agreement did not provide a time for performance, the promisor (respondent) did not become bound by a date imposed upon him by the promisee (appellant) by notice or demand as that amounted to a unilateral imposition of a new term to the contract not agreed to or accepted by the other (see para 9).

(4) The trial judge had not committed any error of law or principle or in his appreciation of the facts before him. He had focused on the correct issues (see para 14).

[Bahasa Malaysia summary

Mahkamah Tinggi telah, atas alasan had masa, menolak tuntutan perayu terhadap responden berdasarkan perjanjian lisan yang dibuat pada akhir tahun 1992. Perjanjian tersebut tidak memperuntukkan jangka masa untuk responden menjalankan tanggungjawabnya di bawah perjanjian tersebut juga ia tidak menyatakan bahawa masa adalah intipati. Hakim perbicaraan menentukan bahawa tempoh satu tahun adalah tempoh masa yang munasabah untuk responden menjalankan tanggungjawabnya di bawah perjanjian dan memutuskan bahawa kausa tindakan terakru pada 31 Disember 1994. memandangkan tuntutan perayu difailkan pada September 2002, mahkamah memutuskan tuntutan tersebut dihalang masa. Dalam rayuannya terhadap keputusan Mahkamah Rayuan, perayu berhujah bahawa memandangkan ia telah memberikan notis kepada responden pada 15 Mei 1997 dan sekali lagi pada 28 Mei 2002 menuntut pelaksanaan di bawah perjanjian, tuntutan tersebut bukan dihalang masa.

Diputuskan, menolak rayuan dengan kos dan mengesahkan keputusan Mahkamah Tinggi:

(1) Kes perayu terhad kepada penentuan, seperti yang diperuntukkan di bawah s 47 Akta Kontrak 1950, mengenai apakah masa munasabah untuk pelaksanaan. Kecuali pihak-pihak bersetuju, apakah masa munasabah menjadi perkara untuk penentuan oleh mahkamah atas keterangan di hadapannya. Hakim perbicaraan menentukan apakah masa munasabah, oleh itu, bila masa mula berjalan. Tidak terdapat rayuan atas dapatan hakim mengenai apakah masa munasabah. Sebaliknya, rayuan adalah mengenai bila masa mula berjalan dan fakta perayu telah memberikan notis-notis pada tahun 1997 dan 2002 sebelum memfailkan tuntutannya pada September 2002 (lihat perenggan 10).

(2) Memandangkan penentuan hakim perbicaraan mengenai masa yang munasabah untuk pelaksanaan di bawah perjanjian bukan perkara subjek

rayuan, ia diterima oleh pihak-pihak. Dalam keadaan ini, dapatan hakim bahawa Akta Had Masa 1953 beraplikasi tidak salah (lihat perenggan 3).

(3) Memandangkan perjanjian tidak memperuntukkan masa untuk pelaksanaan, pembuat janji (responden) tidak terikat dengan tarikh yang dikenakan ke atasnya oleh penerima janji (perayu) melalui notis atau tuntutan memandangkan ia merupakan pengenaan unilateral terma baru kepada kontrak yang tidak dipersetujui atau diterima oleh yang lain (lihat perenggan 9).

(4) Hakim perbicaraan tidak melakukan apa-apa kesilapan undang-undang atau prinsip atau penelitiannya terhadap fakta di hadapannya. Beliau telah fokus ke atas isu-isu yang betul (lihat perenggan 14).]

Notes

For cases on limitation, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3108–3109.

Cases referred to

Mohamed Meydin v Syed Ahmed [1894] 2 SSLR 17; [1894] 1 LNS 5, SC (refd)

Legislation referred to

Contracts Act 1950 ss 47, 56
Limitation Act 1953

Foo Soon Liang (Sebastian Cha with him) (Sebastian Cha & Co) for the appellant.
Wong Kim Fatt (Wong Boon Lee with him) (Gulam & Wong) for the respondent.

Abdul Wahab Patail JCA:

BACKGROUND

[1] In this appeal the appellant relied upon the following findings of fact made by the learned judge in the High Court and not appealed upon by the respondent, and summarised by counsel for the appellant as follows:

(a) the appellant's claim is based on an oral agreement in late 1992, where the respondent had agreed to settle the landowners' interests in a housing development project;

(b) the respondent acted on his obligations by settling the claims of the owners of Lots 2100 and 2043;

(c) the respondent however failed to carry out his obligations to settle with the owners of Lot 3660 (ie Yoong and Yong);

(d) the respondent had committed a breach of his obligation under the oral agreement;

(e) as the oral agreement did not provide for a time frame for settling the claim of the Lot 3660 owners, one year would have been a reasonable time to do so;

(f) therefore the cause of action accrued on 31 December 1994; and

(g) as such, the appellant's claim expired, at the end of 6 years from 31 December 1994, on 31 December 2000.

THE ONLY ISSUE

[2] It was submitted for the appellant that the only issue in the appeal is whether the appellant's claim is in fact time barred, and in the event it is not time barred, the appellant's claim against the respondent ought to be allowed.

[3] Having heard the parties, we dismissed the appeal with costs. Our broad grounds, without prejudice to the issue of complete grounds, have previously been issued as follows:

(a) the two letters did not make time the essence of the oral contract;

(b) therefore, the question of the time being of the essence does not arise;

(c) both parties concede that the oral agreement does not make time the essence of the contract;

(d) therefore, the oral agreement need only be performed within a reasonable time pursuant to s 47 of the Contracts Act 1950;

(e) the trial judge had determined the reasonable time. That is not the subject of appeal before us. Therefore it is accepted by the parties;

(f) in the above circumstances, the finding of the trial judge that the Limitation Act applies is not erroneous; and

(g) leave to appeal having been granted we now give our complete grounds.

THE COMPLETE GROUNDS

[4] It was submitted for the appellant in their written submissions that:

> (25) … where there is non-compliance by the Respondent of its obligations under the oral agreement over a period of time, the Appellant could give notice to require the Respondent to perform its obligation within a reasonable time.
>
> (26) It is only upon failure of the Respondent to perform its obligations within

A the time stipulated in the notice that the Appellant becomes entitled to claim a breach by the Respondent of that obligation. This is trite.

[5] The conclusion of the learned judge that the appellant's claim became B time barred on 31 December 2000 flowed from the finding that the appellant's action accrued on 31 December 1994. That finding itself was founded upon the fact that the oral agreement, made in late 1992, was silent as to the time frame within which the respondent was to fulfil his obligations and did not provide that time was of the essence. The learned judge held that in such event C the oral agreement must be performed within a reasonable time and determined that the action accrued 31 December 1994.

[6] The submission for the appellant relies upon the fact that when the respondent failed to perform his obligation in respect of Lot 3660, the D appellant's former solicitors issued a letter nearly four and a half years later and dated 15 May 1997 demanding performance. About five years later their new solicitors issued a further letter on 28 May 2002. The appellant's claim was then filed in September 2002.

E

[7] Before forming any view, we examined the Contracts Act 1950 s 47 provides that where by the contract, a promisor is to perform his promise without application by the promisee and no time for performance is specified, the engagement must be performed within a reasonable time. The section F provided the explanation that what is a reasonable time in each particular case is a question of fact.

[8] By comparison, s 56 refers to an agreement where time for performance was specified. There it is provided that if the agreement does not provide that G time is essential, non performance does not render the contract voidable, but the promisee is entitled to compensation. If the agreement provides that time is essential, non performance renders the contract voidable, but if a later time is accepted for performance, the promisee is not entitled to compensation for the delayed performance unless at the time of acceptance he gives notice he H intends to claim compensation.

[9] Section 56 illustrates the jurisprudence in contract law, that the terms and conditions that bind the parties are what they have agreed to, and rights that accrued may be lost if not reserved. But a party does not gain other rights I by accepting a non performance and at the same time nominating other terms. Since the underlying rationale in the law of contracts is agreement of the parties, no term may be imposed upon another as a contractual term by notice or demand unless it has been agreed to or is accepted. The point is that if the agreement does not provide a time for performance, the promisor does not

become bound by a date imposed upon him by the promisee by notice or a demand, as that amounts to a unilateral imposition of a new term.

[10] It is not the appellant's case that the respondent had accepted a date for performance. As it stands, the appellant's case is confined therefore to the determination, as provided in s 47, of what is a reasonable time. Unless agreed between the parties, what is a reasonable time becomes a matter for determination by the court on the evidence put before it in this case, the learned judge had determined what that reasonable time was, and therefore when time began to run. There was no appeal on the finding by the learned judge as to what was the reasonable time. Instead, the appeal is as to when time began to run and the fact they had given notices dated 15 May 1997 and 25 May 2002 before filing their claim in September 2002.

[11] The choice of the word 'non-compliance' in the submission that 'where there is non-compliance by the respondent of its obligations under the oral agreement over a period of time …' renders the submission to be without merit. The correct reflection of fact is that there was non performance by the respondent. Whether there was non compliance or a breach depends upon when the respondent ought to have performed the subject obligation. The further submission that the appellant could give notice to require the respondent to perform its obligation within a reasonable time is, as we have explained earlier above, not well founded upon a true interpretation of s 47.

[12] In our deliberation, we took into consideration that the Limitation Act can be somewhat harsh. In *Mohamed Meydin v Syed Ahmed* [1894] 1 LNS 5. Bonser CJ in the Supreme Court of the Straits Settlements expressed the opinion that the law of limitations is a most beneficial law and he was extremely unwilling to do anything to restrict its scope. The civil policy and legislation office of the Ministry of Attorney General, Justice Services Branch of British Columbia prepared a '*White Paper on Limitation Act Reform: Finding a Balance*.' It explained the purpose of the Limitation Act as follows:

> By setting the time limits for many of the cases entering the civil justice system, the current Act sets the basic ground rules for those who wish to resolve their disputes in court. Limitation periods do more than simply suggest a timeline for launching civil proceedings, however. Limitation periods are one of the ways the law allocates risk among different members of society. The longer the limitation period or window of potential liability, the greater the economic risk the person bears. Limitation periods have an impact on the behaviour of parties, the structure of loans and other financial arrangements, record keeping practices, the cost and availability of insurance, professional training requirements, and possibly even the viability of businesses.

[13] We accept that the imposition of time limits within which an action is to be taken, without regard to its inherent merits, arises from the Legislature

having to draw a balance between the cost and standard of justice of the judicial system that it could provide and the access to justice it seeks to provide. The time limitation within which actions for certain classes of claims can be made would ensure that actions are brought in timely manner, while the evidence is available and the defendant has a fair opportunity to answer and to defend himself, and thereby make possible a high standard of justice with decisions based on facts that parties can satisfy themselves as to the correctness thereof with evidence they can check and verify. There must be a definite end point to potential legal liability. It eliminates the injustice of claimants who wait many years to spring an action upon a defendant, who not expecting an action, may have disposed of the evidence he could have relied upon to defend himself.

[14] We can find no reason to seek to give the Limitation Act such an interpretation as to sustain the appellant's action. We found no error of law or principle, or in his appreciation of the facts before him, on the part of the learned judge. He had focused on the correct issues. We, therefore, dismissed the appeal with costs and affirmed the decision of the High Court.

Appeal dismissed with costs and decision of the High Court affirmed.

Reported by Ashok Kumar